FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 1320

FRED C. CAVE,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

WALTER F. MALEY,
CHARLES W. BOWERS,
Counsel for Petitioner.

INDEX.

Page

Authorities.

List of Cases.

Supreme Court of the United States

OCTOBER TERM, 1947.

No.....

FRED C. CAVE,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Fred C. Cave, a resident of the State of Iowa, respectfully petitions for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review its decision and judgment rendered on the 17th day of February, 1947, rehearing denied, March 7, 1947, (R. 489, 495-521), officially reported in 159 F. (2d) 464.

A.
SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Appellant was indicted and tried upon an indictment (R. 2-7), in four Counts charging separately attempts to evade and defeat Federal Income Taxes for the years 1941 to 1944 inclusive, in violation of Section 145 (b) of the Internal Revenue Code, 26 U.S.C.A., Internal Revenue Code. Acquittal followed on Counts I and II involving income taxes for the years 1941 and 1942 and conviction and judgment followed on Counts III and IV relating to taxes for the years 1943 and 1944 respectively. The several counts of the indictment are identical in form except as to dates and amounts of income and taxes. The third count charged:

"That on or about the 15th day of March, 1944, * * * Fred C. Cave, * * * did willfully, knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1943.

"(1) by filing and causing to be filed with the Collector of Internal Revenue * * * a false and fraudulent income tax return wherein he stated that his income tax net income for said calendar year was the sum of $8,455.00; that his victory tax net income for said calendar year was the sum of $8,800.00; that the amount of income and victory tax due and owing thereon was the sum of $1,933.58, whereas, as he then and there well knew, his income tax net income for the said calendar year was the sum of $55,611.60, * * * upon which said net income he owed to the United States of America an income and Victory tax of $30,843.69; and

"(2) by concealing and attempting to conceal from the said Collector and any and all proper officers of the United States the true and correct gross and net incomes received

by him during the said calendar year and the sources thereof: * * *."

The fourth count charged that appellant attempted to defeat and evade his 1944 income tax by filing his return therefor on January 15, 1945, stating that his net income for the year was $788.04 and that the amount of tax thereon was $8.64, whereas he well knew that his net income for 1944 was the sum of $69,959.52 upon which net income he owed to the United States an income tax of $43,392.22.

In Instruction 13 the court withdrew from the consideration of the jury paragraph numbered (2) in each count of the indictment, supra, and submitted only the means by which appellant was charged to have attempted to defeat and evade his income taxes as charged in paragraph numbered (1) in each count thereof.

Instruction 13 (R. 477) is as follows:

"The evidence does not substantiate that the defendant attempted to evade his income tax in the particulars set out in paragraphs numbered (2) in each of the counts of the indictment, and that particular charged to have been the manner in which the defendant so attempted to evade a large part of his income taxes is withdrawn from your consideration, leaving the manner in which it is charged the defendant attempting to evade and defeat his income taxes as charged in the particulars set out in paragraph numbered (1) in each count of the indictment.

This manner in which it is alleged in each count of the indictment that the defendant willfully attempted to defeat and evade a large part of his income tax due and owing by him to the United States of America for each of the calendar years as charged is, in substance, that he filed or caused to be filed with the Collector of Internal Revenue a fraudulent income tax return, and each count of the indictment states

wherein he made certain statements regarding his net income for that calendar year and the amount of the tax due and owing thereon; whereas, it is charged as he then and there well knew, his net income for said calendar year and the tax paid thereon was as set out in amounts in excess of that reported by him.

These facts on which it is alleged the statements in the returns were fraudulent are set out in each count of the indictment, and on this you are instructed that it is not necessary for the Government to prove the exact amounts in which it is charged what his real income was for that year, but that it is necessary that the Government prove substantially the amount of his true net income and the income tax due for each such period, as charged in several counts of the indictment."

In Instruction 14 (R. 478), the Court advised the jury as follows:

"You are instructed that the mere filing of a false or fraudulent return or the willful failure to pay an income tax due, or the willful failure to make a return, or to keep records, or to supply information are not of themselves sufficient to find the defendant guilty as charged in this indictment, but it is incumbent upon the government to go further and show that the defendant committed some wilful act, the likely effect of which would be to mislead or to conceal from the taxing officers the amount of income upon which the tax is levied and if the government fails to prove such additional willful act, the defendant should be acquitted."

However, in Instruction No. 10, relating to Count III of the indictment, (R. 475) and by Instruction No. 11, relating to Count IV of the indictment, (R. 475-6) the material issues were charged as being

(a) The attempt of Petitioner to defeat and evade a large part of the income tax due and owing,

(b) By filing and causing to be filed with the Collector of Internal Revenue, a false and fradulent income tax return,

(c) That he did this knowingly and willfully.

Petitioner challenged the sufficiency of the evidence by Motion for Directed or Instructed verdict (R. 469); the sufficiency of the indictment by demurrer thereto (R. 8); the reasons and grounds for arresting judgment by Motion in Arrest of Judgment (R. 481); as grounds and reasons supporting a new trial by his Motion for New Trial and Exceptions to Instructions (R. 482-489).

In the Eighth Circuit, on Appeal, Petitioner contended,

(1) That the evidence did not support a conviction under Section 145 (b) of the statute because

(a) The indictment failed to charge and the proof failed to establish any willful commission in addition to the willful omission to file a return or to pay a tax.

(b) The offense of tax evasion under Section 145 (b) could not be committed prior to March 15th, the day on which the tax payer is required to file his return.

(2) That the Court erred in the admission of expert testimony given by witnesses Powers and Zimmerman.

(3) That the Instructions given were so indefinite, uncertain, contradictory, misleading, inconsistent and prejudicial as to require reversal on review.

In brief he contended that after the Court, in Instruction No. 13, withdrew Paragraph (2) of each Count of the indictment that it improperly attempted to charge a violation of Section 145 (b) for each year in question, "by filing, and causing to be filed, a false and fraudulent income tax return"; that thus standing it was an insufficient allegation as a matter of law to charge an offense under Section 145 (b) because the indictment, as it then stood, charged not more than an offense under Section 145 (a), and did not support a judgment under Section 145 (b). In other words, Appellant could not be con-

victed under Section 145 (b) without issue and proof of the "commission" of some act in addition to the willful "omission" to file a true, correct and complete return which is declared to be a misdemeanor only under Section 145 (a).

Petitioner contends the Circuit Court erred in holding that there was evidence to sustain the issue under Count IV, of the indictment, as amended, charging that a false return was filed January 15, 1945, at which time it was alleged Petitioner attempted to defeat and evade the tax due for the year 1944, as such tax was not due and payable until the 15th day of March, 1945, and Petitioner could not have been convicted upon this Count of the indictment as the Government failed to show that no amended return was made by Pettiioner or that the correct amount of the tax owing was not paid on or before March 15, 1945, the time required for payment.

Petitioner contends that the Court erred in holding that the testimony of Government witnesses, Paul J. Powers and George J. Zimmerman was properly admitted, and in holding that prejudicial error did not result therefrom for the reason that it is impossible for anyone to say whether or not the jury did not base their conviction, in whole or in part, upon such evidence erroneously admitted.

Petitioner contends that Instructions 10, 11, 13 and 14, were inconsistent, misleading and prejudicial because of the material issues submitted under Instructions 10 and 11, hereinbefore referred to and Instructions 13 and 14, hereinbefore set out.

In brief he contended that the determination of the trial Court to refuse to submit to the jury the issue contained in Paragraph (2) of each Count of the indictment was tantamount to a holding that the government had failed to prove the charge of evasion or concealment contained in paragraph (2), because there was wholly lacking evidence to support

said allegation; that such statements and proof thereof were essential to bring the case under Section 145 (b) by reason of the doctrine announced in the case of **Spies v. United States;** that notwithstanding evidence of the filing of a factually false return the Court in Instruction 14, charged in substance that the mere filing of a factually false return did not constitute an offense under Section 145 (b), but by Instructions 10 and 11 had submitted that issue equivocally to them.

B.

JURISDICTIONAL STATEMENT.

The jurisdiction of the Court is invoked under Section 237 (b) of the Judicial Code, as amended: 28 U.S.C., Section 344 (b). The Judgment of the Eighth Circuit Court of Appeals to be reviewed was entered on February 17, 1947 (R. 489) and rehearing denied March 7, 1947, (R. 495-521). The time for filing Petition in this Court was extended to May 5, 1947. The jurisdiction of this Court is sustained by the following cases: **Spies v. United States,** 317 U.S. 492; **United States v. Johnson,** 319 U.S. 503; **Screws v. United States,** 325 U.S. Pg. 91; **Bihn v. United States,** (dec. June 10, 1946); **Kraus Brothers v. United States,** (dec. Mar. 25, 1946); **Bollenbach v. United States,** (dec. Jan. 28, 1946).

C.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

(a) The trial of Petitioner was so conducted as to deprive him of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. **Spies v. United States,** 317 U.S. 492; **United States v. Johnson,** 319 U.S. 503; **Screws v. United States,** 325 U.S. Pg. 91.

(b) The Court erred in

(a) Overruling Petitioner's demurrer to indictment.

(b) Motion for Instructed verdict.

(c) Motion in Arrest of Judgment.

(d) Motion for New Trial.

(c) In holding that the indictment as amended, was sufficient to charge the felony denonuced in Section 145 (b), and in ruling that proof of willful unreported income was sufficient to sustain a conviction of willfully attempting to evade or defeat the Federal Income Tax under Section 145 (b).

(d) By sustaining the conviction under Count IV, alleging that Petitioner willfully attempted to evade and defeat his tax by filing a false and fradulent return on January 15th when the tax in question was not required to be paid until March 15th of the calendar year in question.

(e) In holding, as a matter of law, that the offense of willfully attempting to evade or defeat Federal Income taxes is complete when the tax payer willfully and knowingly files a fradulent and false return.

(f) In concluding that the incompetent evidence of Government witnesses, Powers and Zimmerman, did not constitute prejudicial error in which their conclusions and calculations were permitted to stand, based upon Exhibits not admitted nor received in evidence.

(g) In deciding that Instructions 10, 11, 13 and 14, were not misleading, contradictory, equivocal nor inconsistent, constituting basic prejudicial error.

D.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The Eighth Circuit has ruled that the mere filing of a false and fraudulent income tax return can constitute a willful attempt to defeat or evade an income tax as defined by Title 26, Section 145 (b), which is a felony, while Appellant contends the law to be that the filing of such a return is violative only of the misdemeanor Section, which is Section 145 (a) of the act in question. **United States v. Johnson**, 319

U.S. 503. It was in error in holding "the Government was not required to prove more than that there was willfully unreported income to sustain a conviction under Section 145 (b)". **Spies v. United States,** 317 U.S. 492. Moreover, Congress provided by Section 3616 (a), Title 26, Internal Revenue Code, that willfully unreported income constituted a misdemeanor.

2. If the ruling of the Eighth Circuit set forth in Paragraph 1 above is permitted to stand, it would constitute a limitation upon and be in contravention of the decision of this Court in **Spies v. United States,** 317 U.S. 492.

3. The effect of the decision of the Eighth Circuit contravenes and overrides the intent of Congress by holding that a tax payer is subject to a more drastic and severe penalty for willfully filing a false return and paying part of his obligation than if he willfully files no return and pays nothing whatever.

4. A judgment of imprisonment or fine can not be justified for the alleged non-payment of a tax on January 15th, of the calendar year when the tax is not required to be paid until the 15th day of March thereafter, without a showing by the prosecution that no amended return was made or that the alleged tax owing was not paid on or before the 15th day of March thereafter.

5. To permit the testimony of expert witnesses to stand based upon hearsay, secondary evidence, Exhibits not before the Court or jury, not identified and not received in evidence, is tantamount to the testimony of invisible witnesses and the denial of the right of confrontation with witnesses, in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

6. A conviction should not stand based upon misleading, contradictory, inconsistent and equivocal instructions upon a fundamental issue.

7. The judgment of the United States District Court and the Eighth Circuit Court of Appeals is not in accord with the decisions of this Court. **Spies v. United States,** 317 U.S. 492; **United States v. Johnson,** 319 U.S. 503; **Bihn v. United States,** (dec. June 10, 1946); **Kraus Brothers v. United States,** (dec. Mar. 25, 1946); **Bollenbach v. United States,** (dec. Jan. 28, 1946).

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit to the end that this cause may be reviewed and determined by this Court; and that the judgment of the United States Circuit Court of Appeals, Eighth Circuit, be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

WALTER F. MALEY,
CHARLES W. BOWERS,
Savings & Loan Building,
Des Moines, Iowa,
Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES—

OCTOBER TERM, 1946.

No. .....

FRED C. CAVE,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

ARGUMENT.

I.

Counts III and IV of the indictment upon which petitioner was convicted charged substantially that Petitioner * * * did wilfully, knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year (1943 and 1944): by (1) filing and causing to be filed with the Collector of Internal Revenue * * * a false and fraudulent income tax return, etc. (2) By concealing, and attempting to conceal from the said Collector * * * the true and correct gross and net incomes received by him during the said calendar year and the sources thereof * * *.

Petitioner had challenged seasonably the sufficiency of the indictment by demurrer thereto (Rec. 8, 9 and 10), the grounds of which being by reference incorporated herein and made a part hereof. Ground 2 charged in substance that the indictment, and each count thereof, was duplicitous in that while each Count purported to charge a single offense they, and each of them, attempted to charge three offenses, to wit, an alleged violation of Section 145 (a) of Title 26; an alleged violation of Section 145 (b) of Title 26, and an alleged violation of Section 3616 (a) of Title 26. Ground 9 of the demurrer asserted that no allegation other than recitals of conclusions of law as distinguished from the statements of ultimate issuable facts appeared in the indictment, or any Count thereof, sufficient to characterize the offense charged as an attempt to evade or defeat income tax under Paragraph (b) of Section 145 of Title 26 as distinguished from the offenses set out in Paragraph (a) of Section 145 of Title 26, or the offenses denounced in Paragraph (a) of Section 3616 of Title 26 of the Internal Revenue Code, and that such distinguishing characteristics must be alleged and proven in order to sustain

conviction under Paragraph (b) of Section 145 of Title 26. The demurrer was overruled. However, it was incorporated in and renewed in Petitioner's Motion for Directed or Instructed Verdict (Rec. 469) at the close of the Government's evidence. That motion was overruled, except for that part of the relief granted by the giving of Instruction No. 13 (Rec. 470). In the 13th Instruction (Rec. 477) the Court withdrew from the consideration of the jury Paragraph 2 of each Count of the indictment in the following language:

> "The evidence does not substantiate that the defendant attempted to evade his income tax in the particulars set out in Paragraphs No. 2 in each of the Counts of the indictment, and that particular charged to have been the manner in which the defendant so attempted to evade and defeat a large part of his income taxes is withdrawn from your consideration leaving the manner in which it is charged the defendant attempting to evade and defeat his income taxes as charged in the particulars set out in Paragraph No. 1 in each count of the indictment."

After the elimination of Paragraph 2 of each count of the indictment, and the limitation to Paragraph I of each Count as the issuable offense charged, the court in the next breath and in the next instruction No. 14 advised the jury as follows: "You are instructed that THE MERE FILING OF A FALSE OR FRAUDULENT RETURN, or the wilful failure to pay an income tax due, or the wilful failure to make a return, or to keep records, or to supply information, are not of themselves sufficient to find the defendant guilty as charged in this indictment, but it is incumbent upon the Government to go further and show that the defendant committed some wilful act, the likely effect of which would be to mislead or to conceal from the taxing officers the amount of income upon which the tax is levied, and if the Government fails to prove such additional wilful act, the defendant should be acquitted." The rule announced in Instruction 14 confirmed petitioner's grounds of demurrer and of his motion for in-

structed verdict, and because conviction followed with resulting affirmance in the Eighth Circuit, suggestion and invitation to correct the error is sought in this Honorable Court.

By opinion, 159 Fed. (2d) page 464, the Eighth Circuit has ruled that the mere filing of a false and fraudulent income tax return can constitute a wilful attempt to defeat or evade income taxes as defined by Title 26, Section 145 (b) of the Internal Revenue Code punishable as a felonw; while petitioner contends the law to be that the filing of such a return can be nothing more than a misdemeanor and subject to prosecution only under Section 145 (a) of Title 26, or Section 3616 (a) of Title 26, each a misdemeanor.

We have found consolation in our contention from the thought expressed by this Honorable Court in **United States v. Johnson,** 319 U.S. 503, wherein you said:

> "In short, the Circuit Court of Appeals read the substantive counts as though they charged Johnson merely with the filing of false returns on March 25th. **They may only be a misdemeanor under Section 145 (a) of the Internal Revenue Code,** but that is not the offense with which Johnson was charged. He was charged with a felony made so by Section 145 (b) * * *."

Now in the case at bar, Cave is charged in the indictment with a violation of Section 145 (b) by attempting to evade and defeat the income taxes for the years stated, and the manner in which he is charged with so attempting to evade and defeat the tax is (1) by filing, and causing to be filed, with the Collector of Internal Revenue a false and fraudulent return. It is upon such an indictment, as amended, that the Circuit Court has upheld Cave's conviction of a felony denounced by Section 145 (b) of the Act in question. That such a conclusion is contrary to the law as pronounced by this Honorable Court is obvious from a careful consideration and analysis of former cases.

The Circuit Court, we suggest, erroneously states that the **Spies** case, (317 U. S. 492) does not support the appellant's theory since in his case Spies **failed** to file any return at all. It is the **failure** to file a return, or the **failure** to pay a tax, or the **failure** to keep records says the Circuit Court which constitutes the misdemeanor under Section 145 (a) in that case, and since Cave actually did file a return, such act of filing satisfies the "in any other manner" provision of Section 145 (b) to create a felony. Such a conclusion, upon analysis, creates results neither conceived or intended by the Congress. The practical question presenting itself is this—is it a greater crime to report part of your income and pay a tax on part, but not all of it, than to refuse to report any income and thus not pay the Government any tax whatever? By following the Eighth Circuit's opinion in the Cave case, and its attempt to distinguish the **Spies** case from that of petitioner, we are led to the highly inconsistent result that Cave, by filing a return and paying a tax, though admittedly a lesser tax than was due, is for that alone guilty of a felony while Mr. Spies who utterly failed to file any return whatsoever, or to pay any tax on his income, was guilty only of a misdemeanor. That Congress intended such a difference in construction, result and penalty on the citizens of this country is hardly susceptible of belief. In similar vein the Eighth Circuit continues:

> "The Government was not required to prove more than that there was wilfully unreported income to sustain a conviction under Section 145 (b)."

Here again the error in the reasoning of the Eighth Circuit is aparent, for under this statement of the law one who files a return, but who does not report all of his income, is guilty of a felony if the Government proves there was wilfully unreported income. Yet this Honorable Court in the **Spies** case, **Supra**, has clearly said that one who fails to file

a return or report any income violates only the misdemeanor provision of Section 145 (a). Thus, according to its opinion, if the Government proves a person wilfully failed to report some of his income, a conviction for a felony may result, but if the Government proves that a person wilfully failed to report all of his income, then that was only a misdemeanor. We suggest that nothing could be farther from justice and the fair administration of the Revenue Laws. By failing to take judicial notice of all of the laws of the Internal Revenue Code, the Eighth Circuit has arrived at a conclusion that could and would clearly have been avoided had they been considered.

In distinguishing the **Spies** case, the Eighth Circuit points out that Section 145 (a) refers only to failure to do certain things, and in holding that Cave's filing of a return is thus taken out of 145 (a) because it is an overt or affirmative act, and not a failure or negative act to file a return, quotes from the **Spies** case as follows:

> "Congress did not define or limit the methods by which a wilful attempt to defeat and evade might be accomplished, and perhaps did not define lest its efforts to do so result in some unsuspected limitation."

and with this as a premise, the Eighth Circuit took the position that while a failure to file any return was a misdemeanor under the **Spies** case, the affimative act of filing a false return was an attempt in some other manner to defeat and evade the income tax sufficient to constitute a felony under Section 145 (b). However, the Circuit Court overlooked the fact that Congress has defined and limited **some** acts which **do not** constitute an attempt to defeat and evade the income tax under Section 145 (b) and one of these is a false and fraudulent return for which a specific penalty is provided in Title 26, Section 3616 (a), as follows:

> "Whenever any person (a) delivers or discloses to the Collector or Deputy any false or fraudulent list, re-

> turn, account or statement with intent to defeat or evade the valuation, enumeration or assessment intended to be made, * * * he shall be fined not to exceed $1,000.00 or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

Here then, is a definite expression by Congress that filing a false and fraudulent return is only a misdemeanor. Obviously then, Congress must have meant something more than such a filing to constitute the felony created by Section 145 (b). What is that "something more"? That is what Congress did not define and which this Honorable Court in the **Spies** case did not define or limit, but did by way of illustration point out, to wit, keeping double sets of books, making false entries or alterations, false invoices, destruction of records, etc., not one of which, or any other acts of concealment, appear in the record in Cave's case.

Since the decision in the **Spies** case, if the government wished to prosecute a citizen for filing a false and fraudulent return, based on the theory of tax evasion, Section 3616 (a) afforded a proper opportunity and a correct avenue of approach. The fact that under 3616 (a) the filing of a false and fraudulent return, with intent to defeat or evade the tax, is only a misdemeanor is persuasive proof that Congress did not intend that a person filing such a return should be charged and convicted with a felony.

It is a matter of common knowledge to the bench and bar that after the decision in the **Spies** case was handed down, the Department of Justice changed the form of indictment in cases of this character so as to include substantially allegations similar to those incorporated in paragraph 2 of each count of the indictment in this case, with the purpose and thought of alleging the performance of affirmative acts so as to charge a felony under Section 145 (b), but when the trial court took Paragraph 2 out of each count, of the indictment, he automatically removed from the consideration of

the jury the charge of affirmative acts necessary to support a conviction under Section 145 (b). The battle ground of the case then, and the pivotal point on which the decision must turn, is the question as to whether or not the mere filing of a factually false return, wilfully and knowingly and with intent to conceal and evade the tax, constitutes a felonw. If it does, then the citizen is better off to file no return at all and the Government's position then puts a premium upon the omission to file a tax return. When a man files a return the Government at least is apprised of his identity, his name and address, the nature and location of his business, the admission that he earns some taxable net income, and the Government is put on inquiry as to whether or not he has, in fact, filed a correct return. The taxing authorities may examine his records and make such investigation as they desire to ascertain the facts in that connection, but if he makes no return they are in the dark as to many matters, and it would seem clear that the failure to file any return at all should be considered a more serious offense than the filing of a factually false return. Hence, it is submitted the filing of a factually false return can be no more serious offense than the offense of failure to file any return at all and that Congress so intended under the Act in question. Therefore, the most that can be said for the indictment after Paragraph 2 was deleted by the Court's ruling was that the indictment charged no more than the commission of a misdemeanor under Section 145 (a).

It is our belief and suggestion to this Honorable Court that this indictment, prepared, as we are advised, in Washington, was based and patterned upon the decision in the Spies case, and that Paragraph 2 of the indictment was incorporated to meet the requirement laid down in the Spies decision that something more than a mere filing of a false return was necessary to charge the felony created by Section

145 (b), something like keeping false records, concealing income or duplicate books, constituting an act or acts of commission, in addition to the mere filing of the return. That is what the **Spies** case had previously held was necessary to be charged and proved, and the failure to allege and prove this additional affirmative act, other than the filing of the return, could not constitute more than a misdemeanor, as this Honorable Court suggested in the **Johnson** case hereinbefore referred to. We believe this assignment of error alone justifies the issuance of the writ requested.

II.

It is Appellant's contention that Count IV, of the indictment, (R. 6) in which it was alleged that Appellant filed his income tax for the year 1944, "on or about the 15th day of January 1945", did not charge a violation of either Section 145 (b) or 145 (a) under the indictment as amended, for the reason that the tax for 1944 was not yet due and payable on the 15th day of January and would not be due thereafter until the 15th day of March 1945, and strictly speaking would not have been due as a basis for criminal prosecution until and unless the government proved that it had not been paid up to and including the time the indictment was returned. Therefore, Petitioner could not, as a matter of law, have been guilty of defeating or evading the payment of a tax not then due and this would especially be true in the absence of some charging act or fact occurring on or before March 15, 1945, or thereafter up to and including the time of presentment by indictment. In fact, the government concedes (Brief Pg. 21):

> "It is, of course, true that actual payment of the tax would not have to be made until March 15th."

The Second Circuit in **United States v. Miro,** 60 F. (2), page 58 at 61, said: "a tax could neither be evaded or attempted to be evaded if it was not due"; if by the terms of

the statute there is no tax due in a particular case, there is no "tax imposed by this act to evade or defeat".

The Seventh Circuit spoke in the same tenor, **O'Brien v. United States,** 51 F. (2d) 1932, by saying:

> "There could, however, be no such prosecution for a willful attempt to evade or defeat a tax unless there was some tax due from the tax payer."

Cold logic would indicate that there could not be evasion of an act or duty until the act or duty was required to be performed. A statutory crime could not be committed prior to that time. However, the government was content to rest its case under Count IV, by proving only that the return made by Appellant on January 15th, was incomplete and therefore false. This was not sufficient to constitute the felony denounced by Section 145 (b).

III.

The Eighth Circuit states in its opinion in regard to the testimony of the government's witnesses, Powers and Zimmerman: "But both witnesses testified that their calculations were based substantially on Exhibits 1 to 44." This is not a correct statement of the record, but is taken from page 23 of the Government's Brief.

On Cross Examination the testimony of Powers is as follows (R. 456):

> "The basis of my calculations are exhibits 1 to 44. I examined each of these exhibits and analyzed them on arriving at the calculations." (R. 458.) "I did not have all these exhibits personally but the information came from the exhibits. I did not inspect these exhibits myself when I made my calculations. I used some invoices and receipts which are not here in evidence. Prior to the trial I made some independent investigation for this case myself. I worked with another person and the other person furnished me with information or facts in the case. This additional information entered into the calculations and figures which I have testified to here in court. To some extent at least, my calculations were based on this

additional information. My figures are based on part of the records before the court, and partly on some records which are not before the Court, and partly on information from someone who assisted me, and partly from my own ideas as to what deductions should be average and estimated. The first time I had occasion to inspect the exhibits here in evidence was last week; **prior to my testimony I had not inspected any of the exhibits which are in evidence."**

How then, can it be said that his calculations were based "substantially on Exhibits 1 to 44"?

What were his calculations actually based upon? The government witness, Thurtle, testified (R. 464):

> "I first began my investigation of this case on February 12, 1945. I worked in conjunction with Mr. Powers from the beginning. Mr. Powers did not accompany me when I made inspection of the various Moose lodges. I took my figures that I had obtained, and give them to Mr. Powers with instructions to compute the income tax. I did not compute the income tax. Mr. Powers talked to me and relied solely on the information as to amount of income that I had given him. * * * I never showed Mr. Powers the books and records."

Thus, according to the record, Powers is the only witness who actually computed the tax of Mr. Cave for purposes of this case. But Powers was not content to use Thurtle's figures from the exhibits. He also used invoices and records which, by his own admission, were not in evidence as exhibits. What these records and invoices were and how much they colored his calculations is the guess of anyone. The government made no effort to offer them in evidence and therefore the part they played in consideration by the jury rests on sheer speculation because Powers made no further explanation of these unknown records other than that he used them. Powers stated that with the exception of Exhibit 15, that none of Exhibits "15 to 34"; being the audit books of Moose lodges, served any purpose in arriving at his

calculations. But these were the substantial source of Thurtle's information. (R. 458 to 464.) Where then, did Powers get the information for his calculations? He further stated he used part of the records in evidence, part of some records not in evidence, information from someone who assisted him and also ventured some of his own ideas to help out where specific information was lacking. Nothing appears in the record as to just what information someone else furnished him that inhered in or influenced his calculations and consequently the result of admitting his testimony could be reasonably expected to have led the jury to believe that all facts from which Powers calculated his figures were established and true. There simply was no possible way for the jury to legally ascertain with any degree of certainty what Powers' calculations were based upon and therefore the admission of his testimony was not only improper but toxically prejudicial to Petitioner.

The Circuit Court in stating that the testimony of Zimmerman was based substantially upon Exhibits "1 to 44", commits the same error as it did in reference to the testimony of Powers. If the hypothetical questions put to Zimmerman, (R. 465) contain the calculations given by Powers they would, of course, mislead the jury into believing they were true and nad foundation in the record. However, the figures on the questions put to Zimmerman do not appear in the record to be identical with the figures of Powers and no other reference to Exhibits "1 to 44" is made in the testimony of Zimmerman can reasonably be expected to have led the jury to believe that the facts given by Zimmerman were true and based upon evidence before the Court when as a matter of fact, the record is to the contrary.

It is respectfully submitted that the Circuit Court fell into error in failing to distinguish between the question as to whether or not there was sufficient evidence in the record

to sustain a conviction, if it be admitted that such proof and such a charge are involved in this case, constituting a felony, and the question as to whether or not the Appellant could be convicted upon prejudicial testimony erroneously admitted upon the trial. If what was done in this case is approved, then a citizen can be convicted upon the testimony of invisible witnesses and be denied the right of Cross Examination and his constitutional right to be confronted with witnesses who appear against him in violation of both the Fifth and Sixth Amendments to the Constitution of the United States. The Eighth Circuit, by opinion, avoided this issue. **Mattox v. United States,** 156 U.S. 237, 240. 39 L. Ed. 409. 15 S. Ct. 337.

IV.

Instructions which do not correctly state the law and which are contradictory, misleading, equivocal and inconsistent, are inherently prejudicial and subject to review even in the absence of exceptions at the time they are given. As stated in **Bollenbach v. United States,** (dec. Jan. 28, 1946):

> "Here then are three different and conflicting theories regarding charges designed to guide the jury in determining guilt, and yet we are asked to sustain the conviction on the assumption that the jury was properly guided * * * a conviction ought not to rest on an equivocal direction to the jury on a basic issue."

In **Kraus Brothers v. United States,** (dec. Mar. 25, 1946), this Court said:

> "While such statements tended to charge a violation of Section 1429.5, as properly interpreted, they were so interwined with the incorrect charge as to negative their effect,"

and quoted with approval the above statement from the **Bollenbach** case.

We take the following from **Bihn v. United States,** (dec. June 10, 1946):

"We assume that the charge might not be misleading or confusing to lawyers, but the probabilities of confusion to a jury are so likely, (Cf. **Chepard v. United States**, 290 U. S. 96, 104, 78 L. Ed. 196, 201), that we conclude that the charge was prejudicially erroneous * * * and in any event the probability of confusion in the minds of jurors seem so great, and the charge was so important to the vital issue in the case, that we conclude that prejudicial error was committed. We certainly cannot say from a review of the whole record that lack of prejudice affirmatively appears * * * nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. Citing **Bollenback, supra.**"

Petitioner urged upon the Eighth Circuit his right to a consideration and review of his exceptions to Instructions 10, 11, 13 and 14, either as a matter of legal right or as a matter guilty verdict either was or could have been based upon them, then they were prejudicial and Appellant was denied the fair and impartial trial guaranteed to him under the Constitution. The above cases from this Honorable Court demonstrate the existence and propriety of this salutary rule of law whether exceptions or objections were timely taken and preserved or not. The issue was submitted generally in Instruction No. 10 as to Count 3, and in Instruction No. 11 as to Count 4. In each of them the issue was submitted generally as to the government's theory. Passing reference to them however, discloses that the issues submitted in each of those instructions could constitute nothing more than misdemeanors under Section 145 (a). This is demonstrated by examination of Instruction No. 14, because by that Instruction the jury were charged that the matters theretofore submitted in Instructions 10 and 11 were not sufficient to support the commission of a felony under Section 145 (b). Instructions 10 and 11 were erroneous because the jury were authorized to predicate

guilt of a felony upon issues therein submitted which could, under the law, constitute nothing more than misdemeanors. In Instruction No. 13, the Court withdrew the issue of evasion and concealment. Then in Instruction No. 14, the trial Court charged the jury that something more must be proven than had been submitted by it in Instructions 10 and 11. Who knows which Instruction the jury followed in returning its verdict of guilt under Counts III and IV. This Honorable Court said in the **Spies case**, 317 U.S. 492:

> "We think a defendant is entitled to a charge that will point out the necessity for such an inference of willful attempt to defeat or evade the tax from some proof in the case other than that necessary to make out the misdemeanor, and if the evidence fails to afford such an inference, then Defendant should be acquitted."

The record will be searched in vain for evidence of any fact supporting the slightest indication of any affirmative act on the part of Petitioner outside of the act of filing an insufficient and incorrect return. That the Instructions complained of are inconsistent, contradictory and equivocal is apparent to any impartial mind. The Circuit Court of Appeals seems to take the position that the record afforded substantial evidence of Petitioner's guilt by reason of his own admissions to Revenue Agents and other proof and that therefore substantial justice was accomplished by his conviction and therefore superficial consideration only required to be given to the means by which the conviction was obtained. The opinion of the Circuit Court does not say that error was not committed in the giving of these Instructions, but says that in their opinion it did not constitute prejudicial error, as there was abundant evidence in the record to warrant the jury in finding the Appellant guilty. The appropriate answer to that avoidance of the issue submitted may be found in the lucid language of Justice Frankfurter in **Bollenbach v. United States, supra,** as follows:

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in federal courts. * * * In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under approprite judicial guidance, however cumbersome that process may be."

The Instructions were misleading, inconsistent, equivocal and contradictory on the basic issue involved and prejudicial error resulted to Petitioner. Some confirmation of this fact may be drawn from the verdicts of acquittal under Counts I and II, although the issues and the proof were of the same type and character.

CONCLUSION.

The decisions of this court determine the issuance of the writ in favor of Petitioner because both under the Constitution of the United States, particularly the Fifth, Sixth and Fourteenth Amendments, the rights of Petitioner were denied by both the United States District Court for the Southern District of Iowa and the United States Circuit Court of Appeals for the Eighth Circuit, and if the orders of said courts are permitted to stand, Petitioner will be unjustly and illegally deprived of his liberty and property without legal cause or right. Petitioner has exhausted all remedy to him for the redress of his wrong and is without other remedy than review by certiorari from this Court. In view of the importance of the questions raised in the administration of

Federal Criminal justice, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

WALTER F. MALEY,
CHARLES W. BOWERS,
Savings & Loan Building,
Des Moines, Iowa,
Counsel for Petitioner.

INDEX

CITATIONS

743902—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1320

FRED C. CAVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 494–505) is reported in 159 F. 2d 464.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 17, 1947. (R. 505–506.) Rehearing was denied on March 7, 1947. (R. 521.) The time for filing a petition for a writ of certiorari was extended to May 5, 1947 (R. 534), and the petition for certiorari was filed May 3, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether an indictment alleging in separate counts that the petitioner wilfully attempted to evade and defeat taxes by the filing of false and fraudulent returns sufficiently charges offenses under Section 145 (b) of the Internal Revenue Code.

2. Whether the trial court properly instructed the jury.

3. Whether an attempt to evade and defeat a tax may be committed by the filing of a false and fraudulent return after the close of the taxable period but prior to the last date in the ensuing period provided by law for making the return and paying the tax owing.

4. Whether the admission of testimony of expert witnesses constituted prejudicial error.

STATUTE INVOLVED

Internal Revenue Code, as amended:

> SEC. 145. PENALTIES.
>
> (a) *Failure To File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment,

or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure To Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1940 ed., Supp. V, Sec. 145.)

STATEMENT

The petitioner was indicted in the Southern District of Iowa (R. 2) on charges, set forth in separate counts, that he wilfully attempted to defeat and evade a large part of the income tax

owing by him for each of the calendar years 1941 to 1944, inclusive. Each of the counts alleged that the petitioner, during the calendar year involved—

> did wilfully, knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America * * * (1) by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Iowa a false and fraudulent income tax return * * * and (2) by concealing and attempting to conceal from the said Collector and any and all proper officers of the United States the true and correct gross and net incomes received by him * * *.

The petitioner was acquitted on counts one and two of the indictment, charging evasion for 1941 and 1942, and was convicted on counts three and four, covering 1943 and 1944. (R. 481.) Counts three and four set forth the amounts reported in the petitioner's returns as net income and tax owing and itemized the corrected gross income, deductions, net income and tax liability.[1] (R. 4–7.)

[1] The following table shows the amounts by which it was charged that the petitioner understated net income and tax:

Year:	*Income per return*	*Income per indictment*	*Difference*
1943	$8,455.00	$55,256.60	$46,801.60
1944	788.04	69,959.62	69,171.58

Year:	*Tax per return*	*Tax per indictment*	*Difference*
1943	$1,933.58	$30,843.69	$28,910.11
1944	8.64	43,392.22	43,383.58

By Instruction No. 13 (R. 477–478) the trial court charged that the evidence did not substantiate "that the defendant attempted to evade his income tax in the particulars set out in paragraphs numbered (2) in each of the counts of the indictment." The court withdrew those particulars from the jury's consideration and specifically reserved to it the determination of the question whether the petitioner had attempted to "evade and defeat his income taxes as charged in the particulars set out in paragraph numbered (1) in each count of the indictment," namely, whether the petitioner had "willfully attempted to defeat and evade a large part of his income tax * * * [in that he] filed * * * with the Collector of Internal Revenue a fraudulent income tax return * * * [knowing that] his net income * * * and the tax paid thereon was * * * in amounts in excess of that reported by him."

The falsity of the returns covering 1943 and 1944 was predicated on the petitioner's failure to report substantial earnings from the operation of slot machines located in club rooms of lodges of the Loyal Order of Moose in various cities in the State of Iowa. Representatives of the various lodges testified as to the arrangements made with the petitioner concerning operation of the slot machines and disposition of receipts. (R. 100–426.) A tax lawyer and accountant employed by the petitioner in connection with proceedings before the Treasury Department involving the re-

turns filed for 1941 to 1944, inclusive, testified concerning the petitioner's written statement under oath showing substantial increases in net worth during the period in question and net income derived from slot machines during 1943 and 1944 in the respective amount of $49,649.35 and $82,399.82. (R. 426-432.)

By Instructions Nos. 10 and 11, respectively (R. 475–476), identical except as to dates, the trial court charged concerning the elements of the offenses involved as to 1943 and 1944. Instruction No. 10 is here set forth in full:

> The material allegations of Count 3 of the indictment are:
>
> 1st, that on or about the 15th day of March, 1944, at Des Moines, Iowa, the defendant, Fred C. Cave, attempted to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1943.
>
> 2nd, that the defendant so attempted to defeat and evade said income tax by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Iowa, a false and fraudulent income tax return, substantially as charged in Count 3 of the indictment.
>
> 3rd, that he did this knowingly and willfully.
>
> If the Government has established each and all of these three foregoing material allegations from the evidence and beyond

a reasonable doubt, then you will be warranted in returning a verdict of guilty against the defendant as to Count 3 of the indictment. But, unless you so find that the Government has established each and all of the three foregoing material allegations of the indictment and from the evidence and beyond a reasonable doubt, then you must return a verdict of not guilty against the defendant on Count 3 of the indictment.

By Instruction No. 12 (R. 476) the trial court charged concerning the requisite of wilfulness, as follows:

> You are instructed that the defendant is not charged in this indictment with an intentional failure to make a return and pay a tax, he is charged with a much more serious offense of attempting to evade and defeat a large part of his income taxes by false and fraudulent statements contained in his income tax returns for the years in question.
>
> A fraudulent statement is a false statement made by a person knowing at the time it was made that it was false and made with the intent and purpose to deceive and mislead some person.
>
> So that one of the material allegations in each one of the counts of the indictment is that the defendant attempted to defeat and evade a large part of the income tax due from him, substantially as charged in

743902—47——2

> that Count by filing or causing to be filed with the Collector of Internal Revenue a fraudulent income tax return containing the statements substantially as set out in that count of the indictment, and that such statements when made were false and known by the defendant to be false, and were made with the intent on the part of the defendant to conceal from the said Collector of Internal Revenue defendant's true and correct gross and net income received by him during the calendar years substantially as set out in such count of the indictment; and in this manner attempted to defeat and evade that part of the tax which was not reported by him in his income tax return for the year in question.

By Instruction No. 14 (R. 478) the trial court further charged:

> You are instructed that the mere filing of a false or fraudulent return or the willful failure to pay an income tax due, or the willful failure to make a return, or to keep records, or to supply information are not of themselves sufficient to find the defendant guilty as charged in this indictment, but it is incumbent upon the government to go further and show that the defendant committed some wilful act, the likely effect of which would be to mislead or to conceal from the taxing officers the amount of income upon which the tax is levied and if the government fails to prove such

additional willful act, the defendant should be acquitted.

The Government called Paul J. Powers and George J. Zimmerman as expert witnesses to compute the income taxes of the petitioner for the years involved. Both witnesses were internal revenue agents of several years' experience. (R. 453, 465.) The witness Powers was called first. He testified on direct examination that his calculations were based upon his examination of Exhibits 1 to 44, inclusive. (R. 453). On cross-examination he stated that "to some extent at least" his calculations were based on additional information not before the Court. (R. 456–458.) The witness Zimmerman testified (R. 465–468) as to the amount of tax owing for each year on two separate bases, one of which was the petitioner's admissions as contained in Exhibit 35 (R. 426–432). The trial court charged in Instruction No. 15 (R. 478) that the jurors were "the sole judges of the credibility of the witnesses and of the weight to be given their testimony." In Instruction No. 16, the relevant portion of which is set forth below, the court charged with particular reference to the witnesses Powers and Zimmerman (R. 479):

> It is for you to say how much weight shall be given to such testimony in this case, * * *.
>
> Their opinions also were based upon an assumed state of facts, that is, a state of

facts which, it is claimed by the Government, have been shown by the evidence are true, so that it is important to determine from the evidence whether or not the facts so assumed are established by the evidence.

If you find the facts stated and assumed as the basis for the hypothetical questions and opinions of these experts are not established by the evidence then the opinions given by the experts based upon such assumed state of facts are entitled to no weight and you should attach no weight to such opinions.

It is for you to say whether such assumed state of facts, that is, the facts with reference to the amount of the income of the defendant and the amounts deducted therefrom, assumed to be true by the experts, have been proven and this you will do from all the evidence in the case bearing upon and tending to prove or disprove the facts so assumed; and if you find from the evidence in the case the facts assumed as a basis for such hypothetical questions are established by the evidence, then you should consider such expert testimony that is given in answer to such questions, in connection with all the other evidence in the case, and give it such weight as you may deem it fairly entitled to, weighing and considering it in the light of the rules given you elsewhere in these instructions for the weighing of testimony.

The petitioner did not testify and introduced no testimony. A motion in arrest of judgment on the ground that the indictment failed to charge an offense under Section 145 (b) of the Internal Revenue Code and a motion for new trial and exceptions to instructions were denied, and the petitioner was sentenced to a fine of $3,000 and three years' imprisonment on each of counts three and four, to run concurrently. (R. 489.) Upon appeal to the Circuit Court of Appeals for the Eighth Circuit, the judgment of conviction was affirmed. (R. 505.)

ARGUMENT

I

The petitioner's contention that an indictment charging only the wilful filing of a false and fraudulent return does not constitute a felony under Section 145 (b) of the Internal Revenue Code but at most a misdemeanor under Section 145 (a) or Section 3616 (a) of the Code results from a patently unwarranted limitation of the scope of Section 145 (b) and a misconception of this Court's ruling in *Spies* v. *United States,* 317 U. S. 492.

Section 145 (b) provides, *inter alia,* that "any person who willfully attempts *in any manner* to evade or defeat any tax * * * shall * * * be guilty of a felony * * *." (Italics supplied.) This language plainly indicates a Con-

gressional intention to cover all possible means of attempted evasion, including the wilful filing of a false and fraudulent return.[2] *United States* v. *Miro*, 60 F. 2d 58 (C. C. A. 2d). The broad scope of the statute in this respect was clarified beyond any doubt in *Spies* v. *United States, supra,* p. 499:

> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner."
> * * *

The argument that application of the *Spies* case, *supra,* here required allegation and proof of wilful acts of commission in addition to the filing of false and fraudulent returns is wholly without merit. The *Spies* case does require, in order to support a Section 145 (b) prosecution, proof of some affirmative action in which the "tax-evasion motive plays any part" where it is charged that the attempted evasion was committed by means of a wilful *failure* to make a return and *failure* to

[2] In the great majority of tax prosecutions, the charge of wilfully attempted evasion has been predicated upon the filing of false and fraudulent returns, a basis repeated sanctioned by this Court. E. g., *United States* v. *Johnson*, 319 U. S. 503, rehearing denied, 320 U. S. 808; *Johnson* v. *United States*, 318 U. S. 189, rehearing denied, 318 U. S. 801; *United States* v. *Ragen*, 314 U. S. 513, rehearing denied, 315 U. S. 826; *United States* v. *Troy*, 293 U. S. 58.

pay a tax, derelictions which are misdemeanors under Section 145 (a). Clearly, however, this Court did not intend to rule out as a possible means of attempted evasion the inherently affirmative action involved in the filing of false and fraudulent returns.

II

The Instructions complained of correctly stated the law applicable to the case and were internally consistent and devoid of any uncertainty. Instructions Nos. 10 and 11 (R. 475–476) properly charged the elements of the offenses involved. *Gleckman* v. *United States,* 80 F. 2d 394 (C. C. A. 8th), certiorari denied, 297 U. S. 709; *United States* v. *Miro,* 60 F. 2d 58 (C. C. A. 2d); *Guzik* v. *United States,* 54 F. 2d 618 (C. C. A. 7th), certiorari denied, 285 U. S. 545; *United States* v. *Schenck,* 126 F. 2d 702 (C. C. A. 2d); *Tinkoff* v. *United States,* 86 F. 2d 868 (C. C. A. 7th), certiorari denied, 301 U. S. 689, rehearing denied, 301 U. S. 715. In Instruction No. 12 (R. 476–477) the trial court elaborated upon one of the elements, wilfulness; in addition, it correctly charged that the offenses involved were not the "intentional failure to make a return and pay a tax" [misdemeanors under Section 145 (a)] but the "much more serious offense of attempting to evade and defeat * * * taxes by false and fraudulent statements contained in his income tax returns" [felonies under Section 145 (b)].

Instruction No. 13 merely removed from the jury's consideration whether the attempted evasion had been committed in each year by acts of concealment other than the filing of the false and fraudulent returns. It properly reserved to the jury the question whether the offenses had been committed by the filing of such returns.

Instruction No. 14 (R. 478) charged in substance that the jury could not convict if it merely found (a) that a factually false return had been filed for each year or (b) that the petitioner had failed to perform the statutory duties of paying a tax, keeping records and supplying information. As to (a), it is elementary that wilfulness is an additional requisite (*United States* v. *Skidmore*, 123 F. 2d 604 (C. C. A. 7th), certiorari denied, 315 U. S. 800); as to (b), it would seem sufficient to observe that it correctly states the rule announced in *Spies* v. *United States, supra.*

III

The petitioner contends that the fourth count does not state an offense under Section 145 (b) because the return for that year was filed on January 15, 1945. The argument is fallacious. Section 53 (a) (1) of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 53) permits a taxpayer who is on a calendar year basis to file his return "on or *before* the 15th day of March following the close of the calendar year." [Italics supplied.] Although Section 56 (a) of the Code (26 U. S. C.

1940 ed., Sec. 56) requires that the tax "shall be paid on the fifteenth day of March following the close of the calendar year," the tax nevertheless "may be paid * * * prior to the date prescribed for its payment." [Italics supplied.] Section 56 (d), Internal Revenue Code. The offense charged in the fourth count was complete when the petitioner wilfully filed the false return. *Guzik* v. *United States,* 54 F. 2d 618, 619 (C. C. A. 7th), certiorari denied, 285 U. S. 545; *Bowles* v. *United States,* 73 F. 2d 772, 774 (C. C. A. 4th), certiorari denied, 294 U. S. 710.

IV

The criticism of the expert testimony is without merit. By Instruction No. 16 (R. 478–479) the trial court properly subjected to the jury's determination the correctness and credibility of all the materials underlying the experts' testimony and left it free to exercise its untrammeled judgment upon their worth and weight. *United States* v. *Johnson,* 319 U. S. 503, 519, rehearing denied, 320 U. S. 808. It thus laid bare for the jury's acceptance or rejection, in whole or in part, the basis for the calculations of the witness Powers, made from examination of all of the exhibits in evidence and only "to some extent" upon reliance of the additional information concerning which the petitioner felt aggrieved. Assuming that the jury chose to reject all of Powers'

testimony, the judgment of conviction nevertheless could rest either on the admissions of tax liability reflected in Exhibit 35 or upon the witness Zimmerman's independent computation therefrom.

CONCLUSION

The decision below is in all respects correct. No important question of law or conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
SEWALL KEY,
Acting Assistant Attorney General.
ELLIS N. SLACK,
MEYER ROTHWACKS,
Special Assistants to the Attorney General.

MAY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947